

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DERRICK MONTE HAIRSTON,

Petitioner,)
v.) 1:13CV83
UNITED STATES OF AMERICA,) 1:11CR313-1
Respondent.)

ORDER

This matter is before this court for review of the Memorandum Opinions and Recommendations filed on June 16, 2015, and October 29, 2015, by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). (Docs. 35, 41.) In the June 16, 2015 Recommendation, the Magistrate Judge recommends that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 23) and his Motion to Amend (Doc. 32), construed as an amendment to his Section 2255 Motion, be denied without issuance of a certificate of appealability. The Recommendation was served on the parties to this action on June 16, 2015 (Doc. 36). No objections were filed by Petitioner to the Recommendation.

Petitioner filed a document entitled "Reply to the Government's Response" (Doc. 40) raising a new claim pursuant to United States v. Johnson, ____ U.S. ____, 135 S. Ct. 2551

(2015). The court construed Petitioner's Reply as a motion to amend his Section 2255 Motion, and in the October 29, 2015 Recommendation, the Magistrate Judge recommends that Petitioner's Motion to Amend (Doc. 40) be denied as futile without issuance of a certificate of appealability. The Recommendation was served on the parties to this action on October 29, 2015 (Doc. 42). Petitioner timely filed objections (Doc. 43) to the Recommendation.

On March 2, 2016, First Assistant Federal Public Defender Eric D. Placke entered an appearance as counsel for Petitioner. Counsel filed supplemental objections (Doc. 45) on behalf of Petitioner requesting that resolution of the Johnson claim be held in abeyance pending a decision from the Supreme Court of the United States in Welch v. United States, ____ U.S. ___, 136 S. Ct. 790, 193 L. Ed. 2d 534 (2016) (mem.), and the Court of Appeals for the Fourth Circuit in United States v. Gardner, No. 14-4533 (4th Cir. appeal docketed July 10, 2014). This court finds that counsel's request should be granted for good cause shown.

The Government and Petitioner are directed to notify the court within 30 days once opinions have been issued in both cases and shall also include in that notification any requests for additional briefing.

This court has made a de novo determination which is in accord with the Magistrate Judge's Recommendation. This court therefore adopts the Recommendation (Doc. 35) dated June 16, 2015.

IT IS THEREFORE ORDERED that the Magistrate Judge's Recommendation (Doc. 35) is **ADOPTED**. **IT IS FURTHER ORDERED** that Petitioner's claims of ineffective assistance of counsel (Doc. 23) are dismissed and that his Motion to Amend (Doc. 32), construed as an amendment to his Section 2255 Motion, is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's motion to amend (Doc. 40) is **GRANTED** and the Petition pursuant to 28 U.S.C. § 2255 as amended as to that one Johnson claim shall be held in **ABEYANCE** pending the Supreme Court's decision in Welch v. United States, ____ U.S. ____, 136 S. Ct. 790, 193 L. Ed. 2d 534 (2016) (mem.), and the Fourth Circuit Court of Appeals' decision in United States v. Gardner, No. 14-4533 (4th Cir. appeal docketed July 10, 2014).

IT IS FURTHER ORDERED that the Government and Petitioner are directed to notify the court within 30 days once opinions have been issued in Welch and Gardner and shall also include in that notification any requests for additional briefing.

This the 14th day of March, 2016.

William L. Osten, Jr.
United States District Judge